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Torts -- Gratuitous Passenger -- Ontario Highway Traffic Act, Section 105(2)

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TORTS — GRATUITOUS PASSENGER — ONTARIO HIGHWAY TRAFFIC ACT, SECTION 105(2). — Many lawyers will no doubt think that the Ontario High Court has taken a backward step in the recent decision of *Feldstein* v. *Alloy Metal Sales Ltd. and Matthews*.[1] But they need not despair. This decision will not halt the recent surge of development in the struggle to diminish the effect of section 105(2) of the Ontario Highway Traffic Act.[2]

Mrs. Clara Feldstein, through an arrangement with Office Overload,[3] was sent to work as a stenographer for the defendant company Alloy Metal Sales Ltd. for a period of seven weeks. Her salary was paid by Office Overload, which in turn was paid by the defendant company. The hours, conditions and methods of work were dictated by Alloy. At the Alloy Metal Sales office there was an arrangement whereby a company-owned station wagon would be driven uptown and back to the defendant company's office each

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[1] [1962] O.R. 476 (Ont. H.C.), *per* Ferguson J.

[2] R.S.O., 1960, c. 172. The section reads as follows:

"(1) The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner.

(2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle."

Subsection (2) was originally enacted in section 11 of S.O., 1935, c. 26; it then became subsection (2) of section 47 of R.S.O., 1937, c. 288 and later subsection (2) of section 50 of R.S.O., 1950, c. 167. Despite its ambiguity no change has been made in the language of the subsection since 1935.

[3] This is a corporation which operates in Toronto that places stenographers into offices usually on a part-time basis. Office Overload charges a fee to the employer and pays the employee an amount somewhat less than this fee after deducting income tax.

day at lunch hour if it was not engaged in other business. A person who worked at the office could use this station wagon to go uptown for shopping or other errands if he was one of the first eight people who signed a list provided for the purpose each day.[4] Mrs. Feldstein signed this list, and was allowed to use the station wagon. While on her way uptown in the station wagon she was injured when it collided with another vehicle due to the negligence of the defendant driver Matthews, who was an employee of the defendant company and who was in the course and scope of his employment. On these facts the court was faced with one seemingly simple issue: did section 105(2) bar the plaintiff from recovery? There were several different theories that could have been utilized by the court to award judgment to the plaintiff. Four of these theories were argued at the trial. All four of them were rejected in turn and the case against Alloy was dismissed.[5]

Probably the weakest argument advanced by counsel for the plaintiff was that the station wagon was a "vehicle operated in the business of carrying passengers for compensation". Thus it was suggested that the plaintiff came within the "exception within an exception" of section 105(2).[6] Although this clause appears to free from the rigour of section 105(2) only a very limited group of situations, it has been broadly construed. In a car-pool "of a commercial nature"[7] where a definite sum of money is paid in return for transportation[8] the courts have allowed recovery to passengers. Although technically this could hardly be called a "*business* of carrying passengers for compensation", in *Ouelette* v. *Johnson*,[9] the Supreme Court recently affirmed the principle of *Lemieux* v. *Bedard*[10] as follows: "One who enters into an agreement to transport other persons in his automobile on a particular journey, in return for payment of an agreed sum of money, and proceeds to

[4] See *Feldstein* v. *Alloy*, *supra* footnote 1, at p. 485.

[5] The action against Mr. Matthews was dismissed on consent at the opening of the trial.

[6] See Laidlaw J.A. in *Jurasits* v. *Nemes*, [1957] O.W.N. 166, (1957), 8 D.L.R. (2d) 659 (Ont. C.A.).

[7] See *Ouelette* v. *Johnson*, [1963] S.C.R. 96, *per* Cartwright J., at p. 100. *Csehi* v. *Dixon*, [1953] O.W.N. 238, [1953] 2 D.L.R. 202 (C.A.) was expressly disapproved. See also *Wing* v. *Banks*, [1947] O.W.N. 897 (C.A.); *Dunnigan* v. *Gareau*, [1954] O.W.N. 504 (alternative holding); *Demianiw* v. *Zinkewich*, [1953] O.W.N. 121 (Co. Ct. J., Alta.); *Smith* v. *Steeves* (1958), 41 M.P.R. 91 (N.B.C.A.) (commercial connotation).

[8] *Chote* v. *Rowan*, [1943] O.W.N. 6, [1943] 1 D.L.R. 339. But see *Turnowski* v. *Turnowski*, 226 N.Y.S. 2d 738 (Supreme Court of King's County) where payment of a brother's hotel bill in return for a drive to a resort did not amount to "*compensation*".

[9] See *supra*, footnote 7.

[10] [1953] O.R. 837, [1953] 4 D.L.R. 252 aff'g. [1952] O.R. 500, [1952] D.L.R. 421.

carry out the agreement, *makes it his business on that occasion* to carry passengers for compensation."[11] In the *Ouelette* case the amount agreed to be paid was not based on the cost of gas or oil but on an amount that one of the passengers had paid to someone else on another occasion.[12]

In a dictum Mr. Justice Cartwright disapproved of *Csehi* v. *Dixon* which disallowed recovery on the basis that the fee paid was arrived at by estimating a portion of the cost of gasoline and oil used by the defendant.[13] His Lordship said that "once it has been determined that the arrangement between the parties was of a commercial nature the manner in which the amount of the fee to be paid was decided upon becomes irrelevant".[14] This interpretation has been extended to include cases where money is paid on only one occasion[15] and even where the plaintiff himself does not pay but other passengers do.[16] If the arrangement is merely a social one or an expense-sharing one, recovery would still probably not be allowed, perhaps even when a lump sum figure was arrived at.[17]

This reasoning seems to have incorporated the contract of carriage theory which was a separate theory before *Lemieux* v. *Bedard*[18] into the exception within an exception theory. But it does seem clear that for this exception within an exception theory to apply, there must be a direct payment of money or money's worth and that this compensation must be the primary object of the defendant.[19] It is not sufficient that some economic benefit is derived by the defendant.[20] The trial judge was on sound ground when he refused to say that this station wagon came within the exception clause in that no money changed hands directly and the prime object of the transportation was not the "compensation".

[11] *Supra*, footnote 7, at p. 100.

[12] *Ibid.*, at p. 99.

[13] *Ibid.*, at p. 100.

[14] *Ibid.* But see *Turnowski* v. *Turnowski*, *supra*, footnote 8.

[15] *Lemieux* v. *Bedard*, *supra*, footnote 10, *per* Pickup C.J.O., at p. 842.

[16] *Bohm* v. *Maurer*, [1958] O.R. 249 (C.A.) aff'g. on other grounds [1957] O.W.N. 373, (1957), 9 D.L.R. (2d) 349.

[17] *Shaw* v. *McNay*, [1939] O.R. 368. See the recent decision in *Johnson* v. *Reisel* (1963), 41 W.W.R. 536 (Man. Q.B.), *per* Campbell J., where a "loose arrangement" to pay four dollars per week was held to be a "convenience acceptable to both parties but not a contract for hire" within s. 99(2) of the Manitoba Highway Traffic Act, R.S.M., 1954, c. 112. The court said that the plaintiff was not a "guest without payment" *re* s. 99(1) since that would require some "social implication". But instead of allowing recovery, it was denied. It is to be hoped that this decision will be reversed on appeal. See also *Neufeld* v. *Prior* (1963), 42 W.W.R. 129 (B.C.S.C.) *per* McInnes J., where there was a joint venture by two salesmen and an expense sharing deal and recovery was denied.

[18] See *supra*, footnote 10.

[19] *Jurasits* v. *Nemes*, *supra*, footnote 6, *per* Laidlaw J.A., at pp. 168 (O.W.N.), 665-666 (D.L.R.).

[20] *Ibid.*

It is submitted, however, that the court could have reasoned that this vehicle was normally used in the business of the defendant company for the transportation of customers and employees and in doing the errands of the company. Although there was no direct money payment in return for transportation in the station wagon there was a more direct economic benefit derived by the company from its use than there was in *Jurasits* v. *Nemes*.[21] In addition, it might fairly have been said that *Jurasits* dealt only with the case of a privately owned vehicle normally used for personal pleasure and that this vehicle was company owned and used continually on company business. Thus, it could be argued that the statement of Laidlaw J. in *Jurasits* was *obiter* dictum.[22] However, on balance, the trial judge was probably wise in refusing to decide *Feldstein* in this way. Perhaps it would have been stretching the wording of the statute too far beyond its already over-extended position.

A stronger theory that was advanced by counsel for the plaintiff was that section 124 of the Workmen's Compensation Act[23] gave Mrs. Feldstein a statutory cause of action. It reads as follows:

> Where personal injury is caused to a workman. . . . by reason of the negligence of his employer or *of any person in the service of his employer acting within the scope of his employment*, the workman . . . have an action against the employer. . . .

This section is in Part II of the Act which applies to persons whose employment is of a casual nature and to industries that are not covered by Part I of the Act.[24] Mrs. Feldstein was engaged in casual work. She was held to be a "workman" as defined in the Act.[25] Alloy Metal Sales was the "employer" of the plaintiff.[26] Mr. Matthews was clearly a "person in the service of his employer acting within the scope of his employment". Thus Mrs. Feldstein should have been entitled to recover on a literal reading of the statute. However in an enigmatic paragraph His Lordship seems to have held that since the defendant *company* was covered by Part I of the Act, Mrs. Feldstein in order to recover had to show that the accident arose out of and in the course of the *plaintiff's* employment.[27] This is clearly wrong. A Part I limitation was applied to a situation where it was not supposed to apply. Part I of the Act is administered by the Workmen's Compensation Board. Under this part, when a workman is injured during the course of his

[21] *Ibid.*
[22] *Ibid.*
[23] R.S.O., 1960, c. 437.
[24] *Ibid.*, s. 123.
[25] See *Feldstein* v. *Alloy Metal Sales*, *supra*, footnote 1, at p. 488.
[26] *Ibid.*
[27] *Ibid.*, at p. 482.

employment in an industry covered by the Act, he may recover compensation from the Board without court action;[28] indeed he is foreclosed from taking court action. Part II of the Act is administered by the courts and not by the Board. It is independent of Part I and covers industries as well as workmen not covered by Part I. Section 124 is in Part II of the Act and creates a cause of action against an employer when one person in his service negligently injures another of his employees.[29] The section does not stipulate that the *injured person* is required to be in the course of his employment. Only the *negligent person* must be in the course of his employment. Indeed, if Mrs. Feldstein was in the course of her employment, she would have been covered by Part I and would have had to claim under that part alone. It was because she was not covered by Part I that she had to commence a court action for compensation under Part II. Strangely enough although statements appear elsewhere in the decision, in which the trial judge seems to have agreed with this interpretation of section 124,[30] he failed to decide the case on this basis.

The trial judge is also clearly wrong when he hints that section 105(2) has obliterated this cause of action.[31] *Harrison* v. *Toronto Motor Car* is explicit in deciding that section 105(2) removed only the newly-created cause of action against an owner *qua* owner, but did not "bar a right of action due to some other relationship".[32] If he is liable as an employer under section 124 of the Workmen's Compensation Act, section 105(2) of the Highway Traffic Act does not extinguish that action.

The third argument advanced had even more merit. In *Dorosz and Dorosz* v. *Koch*[33] it was decided that a baby-sitter's family could recover from the baby-sitter's employer when she was killed while being driven home from work one night due to the negligence of the employer's wife. The court said that there was a term in the contract of employment with the defendant employer providing for safe carriage.[34] This argument which must be distinguished

[28] See ss. 3 and 15 of the Workmen's Compensation Act, *supra*, footnote 23.

[29] See *Humphreys* v. *City of London*, [1935] O.R. 91, *per* Kerwin J., at p. 96. See also dissenting opinion of Roach J.A. in *Kent* v. *Bell*, [1946] O.R. 743.

[30] *Supra*, footnote 1, at p. 482. "I have little doubt that if s. 50(2) [now 105(2)] . . . had not been passed by the Legislature, the plaintiff would have a cause of action against the defendant company . . . ."

[31] *Ibid.*

[32] See [1945] O.R. 1, at p. 13, [1945] 1 D.L.R. 286, at p. 294.

[33] [1962] O.R. 145, (1962), 31 D.L.R. (2d) 179 aff'g. [1961] O.R. 442. Comment, (1962), 40 Can. Bar Rev. 284.

[34] *Ibid.*, at pp. 106 (O.R.), 140 (D.L.R.). See also *Kearney* v. *Livesey*

from the exception within the exception is completely outside the statute. It had its genesis in the broad statement in *Harrison*.[35] In *Feldstein* it was submitted that there was a contract of employment between Mrs. Feldstein and Alloy, the terms of which included the right to a safe station wagon ride uptown on occasion. Thus it was submitted that *Dorosz* was applicable. This argument was rejected by the court. In distinguishing *Dorosz* the trial judge gave a classic example of a distinction without a difference. He said that the station wagon was a "form of convenience which the employees might use. It was in the same class as the use of the chairs in the lounge. It was something given voluntarily, a convenience which the defendant was *in no way required to furnish*. Nothing happened as in *Dorosz* v. *Koch*. Mrs. Feldstein did not say to Mrs. Boyd *that she would not work for the defendant unless the transportation was furnished* as Mrs. Dorosz appears to have said to Mrs. Koch".[36] This notion is a strange and novel one. It seems to require that before a specific term is included in a contract, one of the parties must *require* that the term be included and he must threaten not to enter the contract or to terminate a contract already entered into. There are no cases that require this type of evidence. The *Dorosz* case did not turn on this fact. Granted that the request is evidence of the existence of the term but not the only evidence. Other evidence should suffice. What is important for the formation of a contract is manifestation of consent,[37] not requests, demands, or threats. Often parties to contracts insert clauses for the benefit of other parties without being asked for them. They are nonetheless binding. Indeed, standard form contracts are becoming very common nowadays.[38] A party to one of these contracts might be hard pressed to show that he had required each of these clauses to be inserted or that he would not have entered the contract if any of these terms had not been included. The terms become part of the contract when it is executed. Oral contracts may have terms implied in certain cases.[39] The court should have implied one here. Although the court was entitled to say that there was no evidence that this

(1963), 38 D.L.R. (2d) 290, *per* Haines J. recently affirmed by the Ontario Court of Appeal but not yet reported.

[35] *Supra*, footnote 32 and accompanying text.

[36] *Feldstein* case, *supra*, footnote 1, at p. 485.

[37] See generally, Cheshire & Fifoot, The Law of Contract (5th ed., 1960), p. 19; Williston, A Treatise on the Law of Contracts (3rd Student's ed., 1957), p. 45.

[38] See Cheshire & Fifoot, *op. cit.*, *ibid.*, pp. 22-24; Sales, Standard Form Contracts (1953), 16 Mod. L. Rev. 318.

[39] For example in oral contracts of sale of goods. See *The Moorcock* (1889), 14 P.D. 64 and Cheshire & Fifoot, *op. cit.*, *ibid.*, p. 139 for limitations on this power.

term was part of the contract of employment and that it would not imply one, it did not and merely ignored the *Dorosz* case.

The trial judge went on to confuse the *Dorosz* case with the exception within the exception. He appears to have thought that for *Dorosz* to apply there must have been compensation paid directly in return for the transportation. But that was not done in *Dorosz*. The very importance of *Dorosz* was that the court extended the idea of recovery on a breach of contract theory to cases other than those where money was paid directly for transportation. The court in *Dorosz* found a term in a *contract of employment* providing for safe carriage. The main object of the contract was employment. Transportation was only incidental to that contract. No money was directly paid in return for the transportation. Yet recovery was allowed by the Ontario Court of Appeal. This case is not an example of the application of the exception within the exception; nor is it an example of a simple contract of carriage which was a separate theory for recovery but now may have been incorporated by the *Ouelette* case into the exception within the exception.[40] In *Feldstein* the court should have followed *Dorosz* and said that there was a term in the contract of employment providing for safe carriage and that Alloy was liable on this theory. This decision ought not to be followed by other trial judges since one trial judge cannot bind another.[41] In any event, *Feldstein* conflicts with *Dorosz* and thus *Dorosz* must stand and *Feldstein* must fall.[42]

The fourth argument was probably the most important of all. Alloy Metal Sales should have been liable as master *for* the tort of its servant, Mr. Matthews, committed in the course and scope of *his* employment. Although five different published works are unanimously agreed that this was the effect of *Harrison* v. *Toronto Motor Car*,[43] the Ontario courts have not yet seen fit to agree. However in no case to date did they have to face the issue squarely.[44]

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[40] See text accompanying footnote 18, *supra*.

[41] "Every court is bound to follow any case decided by a court above it in the hierarchy, and appellate courts are bound by their previous decisions". See Cross, Precedent in English Law (1961), p. 5. But see Wells J. in *Dominion Bridge Co.* v. *Carbno* (1961), 29 D.L.R. (2d) 507, at p. 508 where he indicates that he is bound by the Chief Justice of the High Court. It may be that *Feldstein* is *per incuriam*. See *Young* v. *Bristol Aeroplane Co.*, [1944] K.B. 718, Cross, *op. cit.*, p. 138.

[42] See Cross, *op. cit.*, *ibid.*, p. 136.

[43] Wright, (1945), 23 Can. Bar. Rev. 344; Morton, (1958), 36 Can. Bar Rev. 414; Linden, *op. cit.*, footnote 33; Brown and Ball (1962), 2 Osgoode Hall L.J. 322 (student article); Ball, (1963), 2 Osgoode Hall L.J. 530 (student note).

[44] In *Jurasits* v. *Nemes*, *supra*, footnote 6, the employer *himself* was driving and thus there was no issue of vicarious liability *for* the tort of a servant. In *Lexchin* v. *McGillivray*, [1959] O.W.N. 96, (1959), 17 D.L.R.

In *Feldstein* the court was given the opportunity to right its errors of the past but failed to do so. Again it failed to see the argument advanced by counsel and in the above articles. It formulated the argument erroneously as follows: "Section 50(2) [now (105)(2)] is not a bar to the action because the plaintiff was a servant of the defendant Alloy at the time and as a servant she has a cause of action against her master for negligence."[45] Clearly Mrs. Feldstein was not acting in the course of her employment at the time of the accident. If she were, she might have been able to rely on *Duchaine* v. *Armstrong*[46] or claim the benefit of Part I of the Workmen's Compensation Act provisions. She may not have needed the aid of the court. Indeed she would probably have been excluded from court. The argument was and is that Mr. Matthews made Alloy liable vicariously for a tort that he committed during the scope of *his* employment. It is submitted that this was the view of Gillanders J.A. in *Harrison* eighteen years ago and is the present view of all the authors.[47] The court dismissed the argument without understanding it by saying that Mrs. Feldstein was not in the course of *her* employment. This argument should not be confused with the argument based on section 124 of the Workmen's Compensation Act that requires the plaintiff to be a "workman" to come under the Act. The argument based on vicarious liability is wider and would allow recovery by non-workmen and non-employee passengers of the defendant. In the company bus situation all passengers could recover regardless of their employment status. This principle if adopted would be a major victory for the opponents of section 105(2). Therefore there is danger that the court will refuse to go this far in the absence of legislation. At least the issue should be faced. It may be that the court will limit the action to employees or "servants" of the defendant suing for the negligence of fellow servants. If so, this theory would resemble closely the theory

(2d) 408, the driver was not a *servant* of the defendant. See also *Duchaine* v. *Armstrong*, [1957] O.W.N. 251 where a new cause of action was created in favour of a servant against his master based on a misunderstanding of *Harrison*, *supra*, footnote 32.

[45] See *Feldstein*, *supra*, footnote 1, at p. 480. This argument was the one advanced in *Duchaine* v. *Armstrong*, *ibid.*

[46] *Ibid.*

[47] "If the appellant has a cause of action against her master by reason of the negligence of his servant, ss. 2 of s. 47 [now 105(2)] does not take it away even though at the time it arose she was being carried in her employer's motor vehicle", *supra*, footnote 32, at pp. 293-294 (D.L.R.). Compare the headnote relied upon by the later courts in [1945] O.R. 1 with the one in [1945] 1 D.L.R. 286. Mr. Ball argues that this is "clearly" the decision in *Harrison* but in fact it is ambiguous, since in *Harrison* the nurse was within the scope of *her* employment. Thus the statement of Gillanders J.A. could be properly limited to those facts. See footnote 43, *supra.*

advanced in connection with section 124 of the Workmen's Compensation Act. It may be merged with it. Or it may be that the court will limit this argument to the situation where the *plaintiff* is in the course of *his* employment. The court certainly had an obligation to deal with this argument when confronted with it directly.

An argument that was not advanced might have been utilized by the court to find for Mrs. Feldstein. Although the accident did not occur *in the course of* the employment it did *arise out of* the employment. This phrase was used by the court in denying recovery in *Jurasits* when it said that the accident did not occur "*in the course of or arise out of her employment*".[48] The two branches of this statement appear to have different meanings.[49] "*Arise out of*" is a broader phrase than "*in the course of*". In *Dorosz*, Schatz J. at trial held alternatively that the accident there "*arose out of*" the employment though perhaps not "*in the course of*" it[50] thus bringing these facts within the *Harrison* rule as interpreted in *Jurasits*. The Court of Appeal in *Dorosz* did not refer to this theory. It is suggested that this argument is open to the court. *Jurasits* is distinguishable on the facts from *Dorosz*. In *Jurasits* the plaintiff had not yet commenced to work for the defendant when the accident occurred. But in *Dorosz* the work had been completed for the night and had been going on for a time. In *Feldstein*, the plaintiff had already worked several days for the defendants. It is admitted that these distinctions are fine ones, but this is an area where the court seems to relish fine distinctions.[51] It might also have been decided that the *Duchaine* theory of liability *to a servant* could be extended to servants on their lunch hour when transported in company cars.[52]

In conclusion, counsel should not worry needlessly over the *Feldstein* decision. It is out of step with the development that has taken place in this area of the law of torts. In all likelihood the Court of Appeal will overrule it as soon as it gets the opportunity.[53] Other trial judges should refuse to follow this decision since it conflicts with *Dorosz*. It is safe to predict that *Feldstein* v. *Alloy*

[48] See, *supra*, footnote 6, at pp. 169 (O.W.N.), 663 (D.L.R.).

[49] *Cf.* s. 3(2) of the Workmen's Compensation Act, *supra*, footnote 23, where by definition they appear to be the same. See also *Noell* v. *C.P.R.*, [1952] 2 S.C.R. 359.

[50] [1961] O.R. 442, at p. 444. See for a discussion of the different meanings of these words, *Bowers* v. *Hollinger*, [1946] O.R. 526.

[51] See my criticism of the distinction without a difference raised by J. Ferguson in text accompanying footnote 36, *supra*.

[52] So too if on their way to work, but probably not if on their way home, see *Bowers* v. *Hollinger*, *supra*, footnote 50, at p. 532.

[53] Notice of appeal was filed but the case was settled before it was argued in the Court of Appeal.

Metal Sales Ltd. and Matthews will neither halt judicial craftsmanship from continuing to flourish in limiting the scope of section 105(2) nor will it stop the ultimate legislative abolition of the section.[54]

A. M. LINDEN*

* * *

[54] Abolition was recently recommended in a submission to a Select Committee of the Ontario Legislature: see report of Special Committee of Law Society of Upper Canada (1962), p. 12. The Select Committee however, did not see fit to adopt this recommendation. The "loss insurance" system suggested by the Committee if adopted will however alleviate to a great extent the plight of the gratuitous passenger.

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[1] [1961] 3 W.L.R. 1225 (C.A.), [1961] 3 All E.R. 891 (C.A.), [1963] 2 All E.R. 575 (H.L.).

[2] [1951] 4 W.W.R. (N.S.) 549, [1951] 4 D.L.R. 756 (S.C.B.C.), (1952), 5 W.W.R. (N.S.) 97, [1952] 2 D.L.R. 479 (B.C.C.A.), [1953] 2 S.C.R. 216, [1953] 4 D.L.R. 577 (S.C.C.).

[3] See M. M. McIntyre, A Novel Assault on the Principle of No Liability for Innocent Misrepresentation (1953), 31 Can. Bar Rev. 770.

[4] [1932] A.C. 562, 101 L.J.P.C. 119, 147 L.T. 281 (H.L.).

[5] (1923), 40 T.L.R. 201, 130 L.T. 622 (C.A.).

[6] [1933] 1 Ch. 427, 102 L.J.Ch. 191.